LOH ENG LEONG & ORS

v.

LO MU SEN & SONS (SDN) BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: A-02-661-1998]
26 JANUARY 2002

COMPANY LAW: *Shares - Transfer of shares - Transfer of shares from member to member - Failure to give prior written notice to company pursuant to art. 21(b) articles of association - Whether transfer proper - Intent and purpose of art. 21(b) - Whether clear and unambiguous - Whether application to rectify company register to restore name of transferor should be allowed*

COMPANY LAW: *Shares - Transfer of shares - Right of members to transfer shares - Whether subject to prior written notice to company pursuant to art. 21(b) articles of association - Whether requirement applies to transfer of shares from member to member - Intent and purpose of art. 21(b) - Whether clear and unambiguous*

The appellants were shareholders of the 1st respondent company ('the company'). They applied to the High Court, *inter alia*, to rectify the register of the company by striking out the name of the second respondent as the holder of 161 shares ('the shares') in the company. They contended that the transfer of the shares to the second respondent by another member of the company was done without prior written notice to the company pursuant to art. 21(b) of the company's articles of association ('AA'). The learned High Court judge held that the provisions of art. 21(b) were ambiguous, thereby dismissing the application. Hence, this appeal.

Held:
Per Abdul Kadir Sulaiman JCA

[1] Article 21(b) AA requires a transfer notice to be given to the company before a transfer of shares is made even if the said transfer is from a member to another member. That is to invite the knowledge of the other members so as to maintain a harmonious relationship among all members of the company. The purpose of the restriction is also to preserve the proportionality of the other members' shareholdings as

between themselves. However, if after the proper notice is given and no taking is forthcoming from the other members, these members cannot later grouse over the change in the structure of the shareholding in the company. In the present case, it was the intention of the founder of the company to distribute the shares among the members in that fashion. (p 192 a-d)

[2] As to the ambiguity in art. 21(b) AA expressed by the learned judge, there was none. The court disagreed with the learned judge's view that the expression "the person proposing to transfer" appearing therein did not connote a "member or other person entitled to transfer" appearing in the 1st limb of art. 21(a). That expression simply meant an intended transferor which included a member or other person entitled to transfer. (p 193 c)

[3] With the exception of sub-cls. (f) and (g) of art. 21 which did not concern the case herein, a prior written transfer notice is required to be given before a transfer of shares is made even though the transfer is made by a member to another member. Such requirement is not only confined to an external transfer. (p 193 f-g)

[4] The delay in the making of the application for rectification by the appellants as explained by them was of the promise made that sooner or later the shares would be re-transferred to all members of the company in proportion to their respective shareholdings which promise was never honoured. The delay in the making of the application was not a serious issue. (p 196 b-c)

[5] The submission of acquiescence on the part of the appellants found by the learned judge lacked any merit in respect of the first and second appellants who were not parties to the approval of the transfer of the shares by the Board of Directors. As to the third appellant who was present at the meeting of the Board that passed the resolution, his sin if at all should not have clouded the issue of discretion in granting the prayer of the appellants. (pp 196 d, h-i & 197 a)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu-perayu adalah pemegang-pemegang saham syarikat responden pertama ('syarikat'). Mereka telah memohon di Mahkamah Tinggi, antara lain, untuk membetulkan daftar syarikat dengan mengeluarkan nama responden kedua sebagai pemegang 161 saham-saham syarikat. Mereka mendakwa pindahmilik saham kepada responden kedua oleh seorang pemegang saham syarikat tersebut telah dibuat tanpa notis secara bertulis

kepada syarikat mengikut art. 21(b) perkara-perkara persatuan ('PP'). Hakim Mahkamah Tinggi memutuskan bahawa peruntukan art. 21(b) adalah samar dan dengan demikian menolak permohonan tersebut. Maka rayuan ini telah difailkan.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR

[1] Artikel 21(b) PP mengkehendaki satu notis pindahmilik saham diberikan kepada syarikat sebelum sesuatu pindahmilik saham itu dibuat walaupun pindahmilik tersebut adalah daripada seorang pemegang saham kepada pemegang saham yang lain. Ini adalah bertujuan untuk memberitahu pemegang-pemegang saham yang lain bagi memelihara kesejahteraan perhubungan di antara semua pemegang-pemegang saham. Sekatan ini juga bertujuan untuk memastikan bahawa nisbah pegangan saham pemegang-pemegang dikekalkan antara satu sama lain. Walaubagaimanapun, sekiranya notis telah diberikan dengan sempurna dan tiada tawaran diterima daripada pemegang-pemegang saham yang lain, mereka tidak boleh bersungut di atas perubahan dalam struktur pegangan saham syarikat. Dalam kes ini, adalah niat pengasas syarikat tersebut untuk mengagihkan saham-saham di kalangan pemegang-pemegang saham mengikutnya.

[2] Mahkamah ini juga mendapati bahawa tiada kesamaran dalam peruntukan art. 21(b) PP seperti yang diputuskan oleh hakim yang arif. Mahkamah ini tidak setuju dengan pandangan hakim yang arif bahawa pernyataan "the person proposing the transfer" di situ tidak bermakna "member or other person entitled to transfer" yang terdapat di bahagian pertama art. 21(a) PP. Pernyataan tersebut adalah bermaksud pemegang saham yang ingin memindahkan saham termasuk seorang pemegang saham atau sesiapa yang lain yang berhak memindahkan saham.

[3] Melainkan sub-klausa (f) dan (g) art. 21 yang tidak berkaitan dalam kes ini, satu notis pemindahan saham mesti diberikan secara bertulis sebelum sebarang pindahmilik saham dibuat walaupun pindahmilik itu dibuat oleh seorang pemegang saham syarikat kepada seorang pemegang saham syarikat yang lain. Keperluan ini tidaklah terhad kepada pemindahan kepada bukan pemegang saham semasa.

[4] Perayu menjelaskan bahawa kelewatan dalam memfailkan permohonan untuk pembetulan adalah disebabkan oleh janji yang telah diberikan bahawa saham tersebut akhirnya akan dipindahkan semula kepada kesemua pemegang saham syarikat mengikut nisbah pembahagian masing-masing tetapi janji tersebut tidak ditunaikan. Kelewatan memfailkan permohonan tersebut bukanlah satu isu yang serius.

[5] Pendapat hakim yang arif bahawa perayu-perayu bersetujui pindahmilik saham ini adalah tanpa merit terhadap perayu pertama dan perayu kedua memandangkan mereka bukanlah parti kepada pindahmilik saham yang diluluskan oleh Lembaga Pengarah. Manakala, kehadiran perayu ketiga dalam mesyuarat Lembaga Pengarah yang meluluskan resolusi tersebut tidak sepatutnya mempengaruhi budibicara hakim yang arif membenarkan permohonan perayu-perayu.

[Rayuan dibenarkan.]

Case(s) referred to:
Sing Eng (Pte) Ltd v. PIC Property Ltd [1990] 3 MLJ 129 ***(refd)***

Other source(s) referred to:
Palmer's Company Law, 11th edn, Part 1
The Encyclopaedia of Forms and Precedents, 5th edn, vol 9

For the appellant - Cecil Abraham (Yee Mei Kean); M/s Kim & Assoc
For the respondent - Loh Siew Cheang (Kaka Rasul Velo & NK Yong); M/s Shearn Delamore & Co

[Appeal from High Court, Taiping; Civil Suit No: 24-51-1998]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:
This appeal centres around the interpretation of art. 21 of the first respondent's Memorandum and Articles of Association. The said Article states as follows:

> 21. The right of members to transfer their shares shall be restricted as follows:
>
> (a) A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor; but save as aforesaid, and save as provided by sub-clause (f) and (g) hereof, no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the Company to admit to membership, is willing to purchase the same at a fair value.
>
> (b) Except where the transfer is made pursuant to sub-clauses (f) and (g) hereof, the person proposing to transfer any share (hereinafter called "the proposing transferor") shall give notice in writing to the Company (hereinafter called "transfer notice") that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value,

and shall constitute the Company his agent for the sale to any member of the Company (or person selected as aforesaid) willing to purchase the same (hereinafter called "the purchasing member") at the price so fixed, or, at the option of the purchasing member, at the fair value to be fixed in accordance with sub-clause (d) hereof. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revocable except with the consent of the directors.

(c) If the Company shall, within the space of twenty-eight days after being served with a transfer notice, find a purchasing member and shall give notice to the proposing transferor, he shall be bound, upon payment of the fair value as fixed in accordance with sub-clause (b) or (d) hereof, to transfer the share to the purchasing member.

(d) In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party, certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be fair value, and in so certifying the auditor shall be considered to be an expert, and accordingly the Arbitration Ordinance shall not apply.

(e) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money, and the proposing transferor shall be deemed to have appointed any one director or the secretary of the Company as his agent to execute a transfer of the share to the purchasing member, and upon the execution of the transfer the Company shall hold the purchase-money upon trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person.

(f) If the Company shall not, within the space of twenty-eight days after being served with a transfer notice, find a purchasing member and give notice in manner aforesaid, the proposing transferor shall at any time within three months afterwards be at liberty, subject to subclause (h) hereof, to sell and transfer the share to any person and at any price.

(g) Any share of a deceased member may be transferred by his executors or administrators to any child or other issue or relative of such deceased member to whom such deceased may have specifically bequeathed the same, and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustees to the trustees for the time being of such will, and sub-clause (a) hereof shall not apply to any transfer authorised by this sub-clause.

(h) The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares.

The learned High Court judge was of the view that there appears to be ambiguity in the wordings of the provisions of art. 21(b) thereof. He says so in his written judgment as follows:

> However as regards the provision of Article 21(b) of the M&A of the said company there appears to be ambiguity in the wordings of the provision of the said article. Whereas Article 21(a) of the M&A spells out the entity capable of transferring the shares as being "a member" or "other person entitled to transfer", Article 21(b) of the M&A does not mention that said entity. Instead the said Article 21(b) of the M&A spells out the entity that is required to give a transfer notice when transferring shares to a member as being "the person proposing to transfer". There is no mention of a member or other person entitled to transfer shares to a member being required to give a transfer notice. I am of the view since the restrictions imposed by Article 21 of the M&A on the right to transfer shares appears ambiguous the Court should interpret such restriction strictly and that when such a restriction is capable of two meanings, the less restrictive meaning should be adopted. Therefore the correct interpretation of Article 21 of the M&A would be that there is no requirement of a transfer notice when a member or other person entitled to transfer wishes to transfer his shares to another member.

Consequent upon his said view, the learned judge dismissed the application of the appellants by originating summons seeking, *inter alia*, (a) the rectification of the first appellant's register of members by striking out the name of the second appellant as the holder of 161 shares in the company numbered under the share certificates 0050 to 0053, and (b) that the company offers to all its members the purchase of the said 161 shares in accordance with the said art. 21 of the company's Articles of Association.

On the facts, the second respondent, a shareholder of the first respondent company purchased the said shares from another member of the company, Lo Yoon Khong, on a willing buyer and willing seller basis on 6 November 1996 without the transferor having first given a written transfer notice to the company that he desired to transfer the same to the second respondent. The appellants contended, both before the learned judge and before us, that in order for such transfer to be effective, the requirement of art. 21(b) must be complied with in that a prior written notice ought to have been given to the company. However, it is the contention of the respondents that since the transfer involved was between a member to another member of the company, the said sub-clause would not apply, and as such the said transfer of the 161 shares was a valid one.

In the course of the hearing of this appeal before us, the appellants abandoned prayer (b) of his originating summons, which is that the company offers to all its members the purchase of the said 161 shares in accordance with the said art. 21 of the company's Articles of Association. The learned judge in dismissing the application of the appellants did not allow this prayer of the appellants. Therefore, nothing more need be said about this prayer.

Having heard the submissions and considering the evidence before us, we, on 26 July 2001 allowed the appeal with costs in relation to the prayer (a) by ordering the rectification of the register of members of the first appellant's company by striking out the name of the second respondent as the holder of the 161 shares in the said company numbered under share certificates 0050 to 0053 both inclusive thereby restoring the name of the transferor in the said register. We now give our reasons.

The learned counsel for the respondents argues that there are two limbs in art. 21(a) with respect to the right to transfer shares which are separated by a saving clause. The first limb deals with the internal transfer which is from a member or other person entitled to transfer, to any member selected by transferor. The second limb deals with an external transfer which is from a member to a person who is not a member of the company. Only in such latter proposed transfer that a right of pre-emption arises. It is contended that the purpose of the saving clause appearing between the two limbs to sub-cl. (a) is to exclude or to except the specific of the foregoing subject matter from the operation of the general subject matter which follows thereafter. In other word, the function of the saving clause is to exclude a specific subject matter from the operation of a general clause. Since the transfer involved in the matter of the appeal was an internal transfer of shares and not an external transfer, the provisions of sub-cl. (b) do not come into play. Further, the expression "fair value" appearing in sub-cl. (b) do not appear in the first limb but are found in the second limb of sub-cl. (a). Under sub-cl. (b), there is a requirement that the company be constituted as agent to sell the subject shares to any member of the company. It is submitted that these words must naturally refer to the member who is willing to purchase the same at fair value in the second limb of sub-cl. (a) when involving an external transfer. It cannot refer to the member selected by the transferor referred to in the first limb which deals with an internal transfer. Lastly, it is being submitted that the words "(or person selected as aforesaid)" appearing in sub-art. (b) must necessarily refer to the "person selected by the directors as one whom it is desirable in the interests of the company to admit to membership, is willing to purchase the same at a fair value" mentioned in the second limb

to sub-cl. (a). These words cannot refer to an internal transfer of shares under the first limb because the question of selection by directors do not arise under the first limb thereof.

At first blush, this submission by the learned counsel for the respondents appears to have great force. However, going back to the provisions of art. 21 of the company's Articles of Association, looking at it as a whole, we find that the submission so made lacks any merit. The whole of the said art. 21 concerns the restriction imposed upon any transfer of shares in a private limited company such as that of the first respondent company. The whole idea behind such a restriction is to enable the members of such private limited company to have a priority to buy shares in the company in the event that another member intends to sell his shares in it be it to another member or otherwise. This is further to ensure that the shares in the company as far as it is possible, be held by the members of the family. The history of the first respondent company has been clearly laid down in the judgment of the learned judge. The company was founded by the father, Lo Mun Sen, after whom the company was named, who at the material period was the Chairman. The three appellants and the second respondent are brothers and the sons of the founder. Prior to the setting up of the said company, the father had been operating as a sole proprietor in pawnshops and crockery retailing business. With the setting up of the said company, the father gave shares for the consideration of love and affections to his sibling, which includes, apart from them, his fifth son, Lo Yoon On and his sixth son, the transferor of the whole of his 161 shares in the company given to him by the father, which is the subject matter of the present dispute. This transfer of the shares belonging to the sixth son of the father was approved by the Board of Directors by way of resolution. Thereafter the transfer was lodged and registered with the Registrar of Companies. Therefore, it is safe to assume that the maker of the Articles of Association of the first respondent company intends that the shareholders therein be protected in that any change in the structure of the shareholding by the disposal of the shares of any member be it to another member or otherwise as permitted by law, must be with the knowledge of the other existing members, through a transfer notice given to the company thereby giving them the option to purchase at fair value before the shares go out of his hand. More so, if the transfer is on a supposed collusion between the two members, the intended transferor and the transferee, or worst, if it is to be sold to any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership. Bearing that in mind, looking at the first respondent company's art. 21(a) it is true that a share may be transferred by a member or other person entitled to transfer to any member selected by the transferor. But it does not say that

such transfer shall be without any restriction. Though it says that it may be transferred to any member selected by the transferor, however, in the light of the provisions of sub-cl. (b) directing the attention of "the person proposing to transfer any shares", a transfer notice must first be given to the company even if a transfer is from a member to another member, so as to invite the knowledge of the other members so that harmonious relationship among all members of the company is maintained. The purpose of the restriction is also to preserve the proportionality of the other members' shareholdings as between themselves. However, if after the proper notice is given and no taking is forthcoming from the other members, these other members cannot later grouse over the change in the structure of the shareholding in the company. More so, in the present case, it was the intention of the founder of the company to distribute the shares among his children in that fashion ie, his first two children (the first appellant and the second respondent respectively) were each to receive equal shares of 241 shares each which are bigger in quantum than the rest of his four other younger children (the second and third appellants, his fifth children and the transferor), each of 161 shares only.

The exception in sub-cl. (b) made no mention at all as regard the transfer other than the transfer made pursuant to sub-cls. (f) and (g), which do not concern us here. It may invite a separate consideration if the said exception includes also the transfer made pursuant to sub-cl. (a) which governs as well of a transfer by a member or other person entitled to transfer to any member selected by the transferor as to be found in art. 34 of the Articles of Associations of the company in *Sing Eng (Pte) Ltd v. PIC Property Ltd* [1990] 3 MLJ 129 which art. 33 thereof is in *pari materia* with art. 21(a) of the first respondent company's Article of Association. Its art. 34 excepted as well the transfer made pursuant to art. 33. In the circumstances, it is our view that the intent of sub-cl. (b) is to cover all transfers, be it from a member or other person entitled to transfer to any member selected by the transferor or from a member to a person who is not a member. The phrase "but save as aforesaid, ... no share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership" appearing in sub-cl. (a) thereof, in our view, stands on its own in the sub-clause and is not in any way to narrow down the effect of sub-cl. (b). The latter sub-clause, therefore, embraces all transfers as stated earlier. In the circumstances, any transfer of shares taking place within the first respondent company must be governed by the provisions of sub-cl. (b) in that the person proposing to transfer any share in the company must abide by the requirements of sub-cl. (b) thereof. In other words, this latter sub-clause governs not only the transfer of shares

among members but also from a member to any person permitted by the Memorandum and Articles of Association for such a private limited company's shares to be transferred. We say so, in the light of the opening words of sub-r. (b): "Except where the transfer is made pursuant to sub-cls. (f) and (g) hereof". Other than such transfer there would not be any exception given by sub-cl. (b).

As to the ambiguity in sub-cl. (b) expressed by the learned judge, with respect, we find none. The learned judge was of the view that the expression "the person proposing to transfer" appearing in sub-cl. (b) does not connote "a member or other person entitled to transfer" appearing in the first limb of sub-cl. (a). Hence the ambiguity. With respect, we disagree. This expression used in sub-cl. (b) means simply an intended transferor which includes a member or other person entitled to transfer. Form 340 in cl. 2 cited in *Palmer's Company Law*, 11th edn, Part 1 uses the expression "the person proposing to transfer any share (hereinafter called 'the proposing transferor')". The learned author says:

> The words 'proposing transferor' cover the shareholders and also executors and other persons taking by transmission and having power to transfer.

Form 260 in cl. 4 cited in *The Encyclopaedia of Forms and Precedents*, 5th edn, vol. 9 similarly uses the expression "the proposing transferor".

So, indeed there is no magic in the use of the expression "the person proposing to transfer" or "the proposing transferor" in sub-cl. (b) thereof so as to cause the ambiguity in the mind of the learned judge resulting in him in having to interpret the sub-clause strictly in the manner he did.

In conclusion, we hold the view that in the nature of the wordings of sub-cl. (b) excepting only the transfer made pursuant to sub-cls. (f) and (g), which do not concern us here, a prior written transfer notice is required even though a transfer is made by a member to another member, as in the present case. Such requirement by sub-cl. (b) of a transfer notice is not confined only to an external transfer as so termed by the learned counsel for the respondents.

But that is not the end of the matter. The respondents also questioned the delay in the making of the application for rectification by the appellants. In this case, the delay amounts to about 15 months from the date of the transaction in respect of the 161 shares. The learned judge in his judgment said:

I further find that the plaintiffs have been guilty of delay and laches in making their application for rectification of the register under section 162 of the Act at this stage. The position of section 162 of the Act is discretionary in nature and therefore the Court needs to look into the facts of the case whether it can exercise its discretion. This discretion can only be exercised if it is satisfied of the justice of the case. In the present case there has been a delay of about 15 months after the plaintiffs had accepted and acquiesced to the said transfer of shares from one member to another member before such an application is made. In the case of *Re Len Chee Omnibus Co. Ltd.* [1969] 2 MLJ 202 the Court held that as the application was not made within a reasonable time after the applicant became aware of the facts entitling her to relief the application must therefore be dismissed for laches. In the case of *Re Asian Organisation Ltd.* [1961] MLJ 295 the Court took the view that it still has the jurisdiction not to rectify the register and may decline to do so if, for instance the applicant has acquiesced in regarding the allottee as a member of the company notwithstanding the invalid allotment. In the case of *Bellerby v. Rosland & Marwood Steamship Company Ltd.* [1901] 2 Ch. Div 265 it was held *inter alia* that the justice of the case did not require the rectification of the register after the lapse of more than seven years and when nothing had happened in the meantime. It is my view that since the plaintiffs have failed to stop the second defendant as a member from purchasing the said shares from another member at the resolution adopted by the Board of Directors of the said company approving the transfer and that there has been considerable delay in making their application for rectification of the register this Court cannot give the plaintiffs now 'a second bite at the cherry'.

The appellants through the affidavit in support of the application gave the reason for the delay. There were discussions had with a view to settle the matter of the transfer amicably. Some time in December 1996, when they protested to the said share transfer the second respondent decided to tender his resignation as the Managing Director of the company. However, the second respondent's resignation was then not accepted by the Chairman. A further discussion between the parties then took place wherein the second respondent and the father, who was the Chairman of the first respondent company told the appellants that in due course step would be taken to transfer the disputed shares to all the shareholders in proportion to their respective shareholding. But the promise of the transfer of disputed shares to the shareholders never materialised. A copy each of the resignation letter of the second respondent and the rejection by the Chairman dated respectively 27 December 1996 and 31 December 1996 was exhibited in the said affidavit for the appellants. The respondents by their affidavit denied and gave their reason for the attempted resignation of the second respondent being due to their strained relationship on account of non-cooperation of the appellants in the management of the company leaving

everything to the second respondent who sacrificed so much for the company after resigning from his former job as an engineer for 20 years but not being appreciated by the appellants. The affidavit of the appellants further explains that when attempts at settling the matter amicably was without success, they instructed their solicitors which by a letter dated 4 February 1998 notified the respondents of their intended application to the court.

In his judgment, the learned judge made no mention on the version of the evidence proffered by each party except to mention on the aspect of the evidence as related to the third appellant when dealing with the issue of acquiescence on the part of all of the appellants. We will say more on this later when dealing with the issue. For the moment, it is to be noted that the third appellant alone attended the Board of Directors meeting on 6 November 1996 wherein a resolution was passed approving the transfer of the said 161 shares from the transferor to the second respondent. The first and the second appellants were not at the meeting. This is what the learned judge said on the issue of acquiescence:

> It is also my finding in this case that since the third plaintiff had attended the Board of Directors meeting when it was unanimously resolved that the said transfer of shares be allotted to the second defendant and now that the third plaintiff gave a conflicting evidence through his affidavit objecting to the said transfer, the Court should give less weight to his evidence. It would be incongruous to allow parties who have acquiesced to the act to be allowed to renege by applying to this honourable Court for rectification of the register.

The learned judge is entitled to comment on the evidence of the third appellant but it is rather unfortunate for him to have stated that by giving less weight to the evidence of the third appellant, it would be incongruous to allow all parties which comprised the first and the second appellants as well, who have acquiesced to the act to be allowed to renege by applying for rectification of the register. We say so because, the first and the second appellants were not parties to the resolution passed in respect of the transfer of the said shares. In any event, even in respect of the third appellant, we would say more later as regards his evidence on the matter.

It is the view of the learned judge that since the appellants (all three of them) have failed to stop the second respondent as a member from purchasing the said shares from another member at the resolution adopted by the Board of Directors of the said company approving the transfer and that there has been considerable delay in making their application for rectification of the register the court cannot give the appellants now a

second bite at the cherry. We feel that the learned judge has erred in so forming his view when considering the application particulariy that of the first and the second appellants. This is so because from the evidence, the appellants had all along been objecting to the said transfer. Their delay in seeking the assistance of the court, as explained by them, was of the promise made that sooner or later the said shares would be re-transferred to all members of the company in proportion to their respective shareholdings which promise was never honoured. In the circumstances, the delay in the making of the application is not such a serious issue that would disentitle the appellants to the exercise of the discretion by the learned judge to grant them.

Lastly, on the issue of acquiescence on the part of the appellants as found by the learned judge, being one of the reasons for not exercising the discretion in favour of the three appellants. Learned counsel for the respondents in his submission suggested that all the appellants must be taken to have known of the transfer since 6 November 1996 because the third appellant was part of the members of the Board which approved the said transfer. For the reason we stated earlier, this submission lacks any merit particularly in respect of the first and the second appellants who were not parties to the approval of the transfer by the Board of Directors. As for the third appellant, though he was present during the meeting of the Board on 6 November 1996, on the evidence as contained in his affidavit affirmed on 16 May 1998, he admitted signing the attendance at the meeting but he did it on the assumption that it was in the ordinary course of the company's business. He questioned the brief minutes of the meeting recorded which states that the Chairman who is the father, proposed the resolution and it was seconded by the second respondent who was an interested party to the transaction. Perusing the copy of the minutes at p. 226 of the record, we agree that it is indeed a brief one. The Chairman proposed that the resolution be approved and the second respondent, the purchaser, seconded the resolution so proposed and was declared carried. Unfortunate indeed that no record was made in the minute as to any view expressed by the third appellant. According to the list of attendance at the meeting, a copy of which is at p. 227 of the record, only four, including the third appellant and the secretary, were present.

Excluding the proposer and the seconder, the only other member present was the third appellant. Naturally, even if the third appellant had objected to the said transfer, the resolution would have been carried, he being in the minority. In any event, we are not with the third appellant that he was at the meeting on the assumption that it was in the ordinary course of the business of the company because from the notice served on him, it was

clearly stated that one of the agenda was to approve the transfer of shares. His sin, if at all, should not have clouded the issue of discretion in granting the prayer of the appellants as a whole.

For the above reasons, having considered all aspects of the matter, it is the justice of the case that the discretion ought to have been exercised in favour of the appellants in granting the first prayer sought that the register of members of the first respondent company be rectified by striking out the name of the second respondent therefrom as the holder of the 161 shares numbered under the share certificates 0050 to 0053 and restored therein the name of the seller as owner of the said shares.